

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

IN RE: : Case No. 2:06-cv-00620-BMS
 :
 MUSHROOM DIRECT PURCHASER : Philadelphia, Pennsylvania
 ANTITRUST LITIGATION : April 26, 2019
 : 9:28 a.m.

TRANSCRIPT OF MOTIONS HEARING
 BEFORE THE HONORABLE BERLE M. SCHILLER
 UNITED STATES DISTRICT COURT JUDGE

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1 (Call to Order of the Court)

2 THE COURT: All right. I'll say good morning,
3 again.

4 BRUCE GERSTEIN: Morning, Your Honor.

5 ANDREW KELLY: Morning, Your Honor.

6 BARRY REFSIN: Morning, Your Honor.

7 THE COURT: This is In Re: Mushroom Direct
8 Purchaser Antitrust Litigation, the Number 06-620. Now,
9 everybody, let's all the Attorneys state your name and who you
10 represent.

11 MR. KELLY: Andrew Kelly of Odom and Des Roches.
12 I'm here on behalf of the Direct Purchaser Class Plaintiffs,
13 Your Honor.

14 MR. REFSIN: And Barry Refsin of Hangley Aronchick
15 Segal Pudlin & Schiller on behalf of the Direct Purchaser
16 Class.

17 THE COURT: Okay.

18 MR. GERSTEIN: Bruce Gerstein of Garwin Gerstein and
19 Fisher for the Direct Purchaser Class, Your Honor.

20 THE COURT: Any other Plaintiff Lawyers back there?

21 MR. KELLY: No.

22 THE COURT: No? Okay.

23 MR. KELLY: Yeah, there -

24 PLAINTIFF'S ATTORNEY: I think we all are.

25 MR. GERSTEIN: They are, Your Honor. They're all

1 Plaintiffs, but -

2 THE COURT: Yeah, I know, but -

3 MR. GERSTEIN: - we can do the talking.

4 THE COURT: - anyone from a different firm, or -

5 DAN ZIMMERMAN: Yes, Your Honor, Dan Zimmerman from
6 Phelps Dunbar.

7 THE COURT: See? I knew there was a stranger in our
8 midst.

9 MR. ZIMMERMAN: Yes, Your Honor.

10 BENJAMIN WIDLANSKI: And Judge, Ben Widlanski on
11 behalf of Kozyak -- for Kozyak Tropin & Throckmorton, on behalf
12 of the Plaintiff Class.

13 THE COURT: On behalf of who?

14 MR. WIDLANSKI: The Plaintiff Class.

15 THE COURT: Oh, the whole Class.

16 MR. KELLY: Same.

17 THE COURT: All right. Defendants?

18 WILLIAM DESTEFANO: Good morning, Your Honor.
19 William DeStefano for the firm, Stevens & Lee, on behalf of the
20 group of Defendants previously identified.

21 H. LADDIE MONTAGUE, JR.: Laddie Montague from
22 Berger Montague, on behalf of the same group of Plaintiffs
23 [sic].

24 THE COURT: All right.

25 MR. MONTAGUE: The same group of Defendants.

1 DONNA ALBANI: Donna Albani -

2 THE COURT: He's learning. He's on the other side
3 of the bench, you know? Normally, he's over there. Okay.

4 MS. ALBANI: Donna Albani for M.D. Basciani & Son,
5 Inc.

6 JAMES RODGERS: James Rodgers for Franklin Farms.

7 MATTHEW BORGER: Matt Borger from Klehr Harrison on
8 behalf of the Mushroom Alliance. Good morning, Your Honor.

9 THE COURT: All right. Now, the first thing I want
10 to talk about is settlements. I've received Plaintiffs' Motion
11 to Sever, and for preliminary approval of a settlement between
12 Class Plaintiffs and Cardile Mushrooms, Inc. and Cardile Bros.
13 Mushroom Packaging.

14 I'll be issuing an Order on that Motion shortly.
15 Before I do that, however, I understand there may be additional
16 settlement, or settlements, in the works. If so, does it make
17 sense for the Court to wait for additional filings in order to
18 simplify the timeframe for approval of any settlements?

19 MR. GERSTEIN: Your Honor, there is some settlements
20 in the works that we're close to, particularly Mr. Montague and
21 Mr. DeStefano's Clients. And I think it would make sense to
22 wait, because we would have to work out the details of that
23 settlement. And it would cut down on the amount of Notices
24 that have to go out, because, or else, we'd have to have
25 multiple Notices for the settlements.

1 THE COURT: All right. Well, we will wait for that
2 before I do anything on any of the other settlements.

3 MR. GERSTEIN: I think that that makes sense,
4 Your Honor.

5 THE COURT: Okay. And I want to make clear that the
6 Plaintiffs should notify the Court promptly of any further
7 settlements, and also notify the other Defendants of any
8 Cooperation Provisions contained in those pending settlements.
9 And I'll get to that last issue in more detail, when we discuss
10 the Motions in Limine.

11 MR. BORGER: Your Honor, on behalf of the
12 Mushroom Alliance, I would just like to give the Court notice
13 that the Mushroom Alliance has reached a settlement with the
14 Class Plaintiffs.

15 MR. GERSTEIN: I overlooked that, Your Honor. Yes,
16 and L&M do, also.

17 THE COURT: Say that again.

18 MR. BORGER: J&M [phonetic] Farms, also.

19 MR. GERSTEIN: JM did, also. I apologize.

20 THE COURT: What's that?

21 MR. GERSTEIN: There's another settlement with the
22 Mushroom Alliance and JM Farms, also, that we've reached
23 agreement. We have the paper over at -

24 THE COURT: What are you talk -

25 MR. GERSTEIN: There was another settlement with the

1 Mushroom Alliance and -

2 THE COURT: Right.

3 MR. GERSTEIN: - J&M Farms that we've entered into
4 an agreement. But we have to basically produce the papers.
5 And -

6 THE COURT: Okay.

7 MR. GERSTEIN: - that would also -

8 THE COURT: So that's going to be like Cardile and
9 everything else?

10 MR. GERSTEIN: Right.

11 THE COURT: Okay.

12 MR. GERSTEIN: Would be part of that.

13 THE COURT: Good; all right. Who are you?

14 JOEL FISHBEIN: I'm Joel Fishbein. I thought this
15 started at 9:30. I'm sorry.

16 THE COURT: What'd you think?

17 MR. FISHBEIN: I thought this started at 9:30. I
18 apologize. My name's Joel Fishbein. I represent Cutone
19 Mushroom.

20 THE COURT: Okay.

21 MR. FISHBEIN: M. Cutone.

22 THE COURT: What I'm going over now is any
23 settlements that we're done. And we've already had comments
24 that there's two or three settlement. Did you hear?

25 MR. FISHBEIN: I've heard about that. Yes.

1 THE COURT: Okay. Good. Okay.

2 MR. FISHBEIN: Thank you.

3 THE COURT: You're not in any of them, are you?

4 MR. FISHBEIN: Not yet.

5 THE COURT: Oh.

6 MR. FISHBEIN: Not that I'm aware of, no.

7 THE COURT: Good. I knew you'd get to that
8 eventually. All right. So, who's left?

9 MR. GERSTEIN: We have -

10 MR. RODGERS: Franklin's left, Your Honor. Frankly,
11 we're a little bit concerned at the way this process has played
12 out. We understand that the Court was involved in helping the
13 main Parties get close to settlement, which is certainly a -

14 THE COURT: I sure hope so.

15 MR. RODGERS: - laudable thing. I'm just concerned
16 that that process not be used to whipsaw the couple of us that
17 have been trying to settle -

18 THE COURT: Have I said -

19 MR. RODGERS: - and haven't gotten there.

20 THE COURT: - anything to you? By the way, who do
21 you represent?

22 MR. RODGERS: Franklin, Your Honor.

23 THE COURT: Have I said anything to you?

24 MR. RODGERS: Not a word, Your Honor.

25 THE COURT: Have I whipsawed you?

1 MR. RODGERS: No, you have not.

2 THE COURT: I never even spoke to you until now,
3 right?

4 MR. RODGERS: That's correct, Your Honor. I'm not
5 suggesting you would whipsaw, Your Honor. Thank you.

6 THE COURT: Oh.

7 MS. ALBANI: We're left, too, Your Honor.

8 THE COURT: You want to be whipsawed?

9 MS. ALBANI: Well, I don't know. I have to echo
10 Mr. -

11 THE COURT: Well, in today's world, I shouldn't say
12 that to you, I guess. I don't know.

13 MS. ALBANI: That's okay. I have to echo
14 Mr. Rodgers' concern. We learned yesterday, the first time,
15 that there had been ex parte communications with Your Honor by
16 Mr. Montague and Mr. Gerstein.

17 We understood that there was actually a meeting on
18 April 23rd. And we would like the record to note that we were
19 never given notice that such a request had been made.

20 We were not given notice that a meeting had been
21 scheduled. And we were not notified by the Court that a
22 meeting -- promptly notified that a meeting had occurred with
23 Counsel, without our notice.

24 We feel we've been unfairly prejudiced, as a result.
25 We don't know what transpired at that meeting. We have no way

1 of knowing or confirming, or disproving, what happened.

2 THE COURT: Well, let me just say -

3 MS. ALBANI: And -

4 THE COURT: - that to you and everybody. If anyone
5 is in the midst of a settlement or think I can facilitate
6 what's going on, I'm happy to talk.

7 MS. ALBANI: We -

8 THE COURT: I don't have a problem with that.

9 MS. ALBANI: The process in the case, to-date,
10 Your Honor, has involved, for example, Judge O'Neill has
11 schedule to separate settlement conferences with Counsel. And
12 the process that was followed at that time was to assign
13 Magistrate Rice, in the first instance.

14 THE COURT: Yeah, well, I told you -

15 MS. ALBANI: Magistrate Hey -

16 THE COURT: - there's a new Sheriff in town.

17 MS. ALBANI: I understand that, Your Honor.

18 THE COURT: Okay.

19 MS. ALBANI: I'm just expressing our concerns and
20 noting, for the record, that we never received notice of a
21 meeting.

22 THE COURT: Well, I don't know why you'd receive
23 notice from me. All I know is I got a phone call. Two Lawyers
24 said they'd think I might be helpful. Would I mind
25 entertaining them coming and talking about it? I said, no,

1 come on in.

2 MS. ALBANI: And of course, we would have been
3 thrilled to be invited to that meeting.

4 THE COURT: You were.

5 MS. ALBANI: And of course, we have a Settlement
6 Offer on the table. And this was all -

7 THE COURT: Well, great.

8 MS. ALBANI: - news to us -

9 THE COURT: If you want to come talk to me about it
10 with Mr. Gerstein, I'm happy to do it.

11 MS. ALBANI: Thank you, Your Honor. I'm just
12 putting that on the record.

13 THE COURT: Okay. Anybody else want to come in and
14 talk to me about settlement? I'd be happy to do it. I won't
15 contribute to the settlement, though, but -

16 MR. GERSTEIN: Your Honor, just for the record, I'm
17 happy to meet with you and any of the Defendants' Counsel, if
18 it would be helpful to them to have to overcome our
19 differences.

20 But I take issue with the word that it was ex parte,
21 because, as to these specific Defendants, it was discrete. You
22 had Counsel from both sides with you. So, there was nothing
23 ex parte done regarding our conversation.

24 THE COURT: So -

25 MS. ALBANI: I don't think Mr. Gerstein will

1 disagree that he did not contact us and say that he was making
2 that request, or invite us to participate.

3 THE COURT: Well, as to who came to the meeting, it
4 was Counsel for several Defendants and Counsel for Plaintiffs.
5 Now, if you weren't in that discussion, maybe you and
6 Mr. Gerstein ought to talk about moving your settlement
7 discussions forward. And if I can facilitate them, I'm happy
8 to do it.

9 MS. ALBANI: Thank you, Your Honor.

10 THE COURT: Okay. So, let's talk about the Motions
11 in Limine. I've read each of them and I'm prepared to rule on
12 them soon.

13 But I understand you'd like to make oral argument on
14 some of the Motions. And I may have some follow-up questions.
15 So, I'd like to take them in order, Plaintiffs' Motions, and
16 then Defendants' Motions.

17 So, first, regarding Plaintiffs' Motion to Preclude
18 Defendants from Asserting a Good-Faith or Reliance on
19 Counsel Defense, which is ECF Number 956. Plaintiffs, you may
20 make your argument.

21 MR. REFSIN: Yes, thank you, Your Honor.
22 Barry Refsin for the Direct Purchaser Class.

23 THE COURT: If you want, if it's easier, you can sit
24 at the table.

25 MR. REFSIN: Oh, I'm -

1 THE COURT: Just move the microphone closer to you,
2 if it's easier -

3 MR. REFSIN: I -

4 THE COURT: - to -

5 MR. REFSIN: No, I think I'm fine here.

6 THE COURT: Oh, okay.

7 MR. REFSIN: Thank you, Your Honor.

8 THE COURT: All right.

9 MR. REFSIN: This Motion in Limine involves
10 arguments and evidence that we believe the Defendants intend to
11 put on, that they tried to act in good-faith to comply with the
12 Capper-Volstead Act, which is the exemption from immunity that
13 was, at one point, at-issue in this case.

14 And we believe they also intend to try to show that
15 they relied on Counsel in their belief that the Capper-Volstead
16 Act provided immunity. And that issue, as Your Honor knows,
17 was decided by Judge O'Neill, who granted Summary Judgment to
18 the Plaintiffs on that issue, and said that that Affirmative
19 Defense on that very narrow Antitrust Immunity does not apply.

20 Since that issue is now out of the case, we don't
21 think it's appropriate for the Defendants to argue that
22 immunity and tell the jury about that immunity to try to expand
23 that very narrow immunity that Judge O'Neill found did not
24 apply.

25 The Court ruled on this issue in 2014. It was in a

1 case that's reported at 54 F.Supp.3d 382. And the Court found
2 that the -- and said that:

3 "The affirmative defense of good faith reliance on
4 counsel is [only] warranted where the offense alleged
5 involves willful, unlawful specific intent."

6 And he said, here:

7 "A violation of the Sherman Act does not require
8 proof of specific intent, [so that] the advice of
9 Counsel would not be a proper defense to such related
10 claims."

11 So, we don't believe that that evidence that the
12 Defendants had the advice of Counsel on the Capper-Volstead Act
13 is something that should be presented to the jury. That same
14 issue was addressed by Judge Pratter in the Eggs case.

15 Now, the Eggs case is cited. There are a lot of
16 different opinions in the Eggs case that we've cited in the
17 Motions in Limine.

18 There's some respects in which the Eggs case is
19 similar to this case. There's some respects in which it does
20 not.

21 But, on this issue, about whether you should be able
22 to argue that there's a good-faith exception to the
23 Capper-Volstead Act, where the jury gets to hear about the
24 Capper-Volstead Act, after the Judge grants Summary Judgment to
25 the Plaintiffs on it, the case is on all fours with this case.

1 And Judge Pratter first decided that there was no
2 good-faith expansion to the narrow Capper-Volstead Immunity.
3 That was in a case that she decided in 2016. And then, she
4 decided a Motion in Limine exactly like the one that we're
5 bringing here.

6 And she decided, in April 5th, 2018, at
7 2008 Westlaw 1637960 that all testimony relating to Defendants'
8 belief of immunity had been rejected at Summary Judgment and
9 should not come into the trial.

10 We think that the same result should be reached here.
11 We don't think that the fact that the Defendants believed that
12 they were entitled to immunity is relevant to the Rule of
13 Reason.

14 The issue under the Rule of Reason is whether there
15 was a reasonable restraint on competition. The fact that the
16 Defendants had legal advice has no relevance to the effect of
17 their conduct on competition, that they fixed prices.

18 We're accusing them of fixing prices and of limiting
19 supply. The fact that they thought they had immunity from
20 antitrust prosecution doesn't change the effect of that conduct
21 on competition.

22 The Defendants say that it should be -- submit that
23 it's an issue, that the questions of intent are relevant to the
24 application of the Rule of Reason. That's not correct. The
25 Rule of Reason does not consider the good-faith of the

1 Defendants.

2 Now, there is some caselaw that says that issues of
3 intent may be relevant to interpreting the facts under the Rule
4 of Reason. But the facts that we have here, the fact that
5 there was legal advice about whether the immunity was
6 satisfied, is not the kind of evidence that's relevant to
7 determining competitive effects.

8 In fact, the Third Circuit confirmed, in 2017, in a
9 Rule of Reason case, that intent was not an element of a Rule
10 of Reason case. And that's in the Lipitor that's reported at
11 868 F.2d 231 [sic], where the Court said, in a Rule of Reason
12 case, that intent is not an element of an Antitrust Claim. And
13 benign intent does not shield anticompetitive conduct from
14 liability.

15 Like I said, it may be relevant in some cases to
16 interpret the facts. But the fact that there's an Attorney who
17 gave advice about an immunity that doesn't apply to this case
18 is not the kind of evidence that would be appropriate,
19 interpreting those facts.

20 THE COURT: All right. Let me -

21 MR. REFSIN: And in fact, just one last thing, if it
22 had any slight relevance, it's something that should be
23 excluded under Federal Rule of Evidence 403, because it would
24 be extremely prejudicial to tell the jury about an immunity
25 that doesn't apply.

1 THE COURT: All right. Let me hear -

2 MR. REFSIN: Thank you.

3 THE COURT: - from your Opponent. Who's going to
4 take the other side of that argument?

5 GEOFFREY JOHNSON: Good morning, Your Honor.

6 Geoff Johnson from Stevens & Lee. Just want to respond to a
7 couple points here, and kind of cut through the thicket on
8 this.

9 Mr. Refsin says we can't argue an immunity. As we
10 said on the first page of our response to their Motion, we're
11 not arguing an immunity. Judge O'Neill has ruled, and we will
12 accept that Ruling for purposes of this trial, no Good-Faith
13 Immunity Defense, period.

14 Having said that, after ruling that there was no
15 Good-Faith Immunity Defense, Judge O'Neill applied the Rule of
16 Reason to the Price-Fixing Claims. And the Rule of Reason very
17 clearly requires -- and these are Judge O'Neill's words,
18 quoting the Third Circuit:

19 "An analysis of all the circumstances of a case."

20 Not only that, for over 100 years, the Supreme Court
21 has said, you have to look to the history and purpose of
22 conduct. And the Third Circuit has said that the intent
23 underlying a restraint -- and I'm quoting here -- is:

24 "A crucial variable in aiding the Court to assess the
25 competitive effects of the restraint."

1 They seek to categorically preclude, in advance of
2 trial, any and all reference to the involvement of Legal
3 Counsel in the decision-making process that goes to the heart
4 of the alleged price restraints. We submit it is impossible
5 for Your Honor to do that in a vacuum in advance of trial.

6 With respect to the claimed prejudice, their
7 Pleading, and throughout this case, has been littered with
8 allegations that we intentionally broke the law. That's what
9 we did, apparently.

10 Naked price fixing, that the EMMC was formed for no
11 unlawful purpose. These are their -- or, sorry, for no lawful
12 purpose.

13 THE COURT: There you go, you know?

14 MR. JOHNSON: Sorry.

15 THE COURT: Sounded like someone I once heard of who
16 said, I don't know why he would do it.

17 MR. JOHNSON: But, Your Honor, we should be
18 permitted. It belies reason to say they would be prejudiced -

19 THE COURT: You don't know -

20 MR. JOHNSON: - by -

21 THE COURT: - my reference, huh?

22 MR. JOHNSON: I do not, Your Honor.

23 THE COURT: No?

24 MR. JOHNSON: I apologize.

25 THE COURT: Took place in -

1 MR. JOHNSON: What is the reference?

2 THE COURT: - Helsinki. Go ahead.

3 MR. JOHNSON: But, Your Honor, we would be the ones
4 unfairly prejudiced, if we were not permitted to counter their
5 allegations that we broke the law. And it is not an Immunity
6 Defense, to be clear. But it is a factor to be considered in
7 the mix.

8 If you want to put a Limiting Instruction in the Jury
9 Charge to say you can't consider this as an Immunity Defense,
10 fine, because we don't seek to assert that at this trial. We
11 may appeal it later, if we have to. But, for purposes of
12 trial, we accept it.

13 But, at this point, it's too early in the game. And
14 also, to note, their Exhibit List is littered with examples,
15 and their deposition testimony, too, of the involvement of
16 Legal Counsel in this decision-making process at-issue with
17 respect to the price restraint.

18 So, we submit that it's just too premature to grant
19 this Motion. And instead, case-by-case objections is the more
20 appropriate method here.

21 THE COURT: Okay. Thank you.

22 MR. JOHNSON: Thank you, Your Honor.

23 THE COURT: Now, I want to hear argument from
24 Plaintiffs regarding Plaintiffs' Motion to Preclude References
25 at Trial to the Capper-Volstead Act. That's ECF Number 957.

1 MR. REFSIN: Yes, Your Honor. This Motion is
2 related to the first. It's a similar issue. But this actually
3 involves evidence about the Capper-Volstead Act, itself. I
4 mean, that's the limited immunity that's already been ruled out
5 of this case.

6 And I would just like to add that I think either of
7 these Motions are premature. I mean, these are issues that I
8 think are likely to come up in the Defendants' opening in this
9 case.

10 We believe that they're going to open this case by
11 saying that they believed, in good-faith, that they had a
12 defense to antitrust immunity. And that's something that would
13 be very prejudicial in this case, because those issues have
14 been found not to apply in this case.

15 And the caselaw is very clear that this immunity is a
16 very narrow immunity that the Defendants are not entitled to
17 claim, as Judge O'Neill found. In fact, on the Capper-Volstead
18 Act Immunity, itself, that's an issue that's been addressed
19 three separate times by this Court.

20 Judge O'Neill found, twice, that the Capper-Volstead
21 Act Immunity didn't apply. In 2011, he ruled that it didn't
22 apply.

23 He denied a Reconsideration Motion on that issue in
24 2014. And then, I believe Your Honor, when you first got
25 involved in this case, rejected another Motion for

1 Reconsideration in 2018. It's very clear that the
2 Capper-Volstead Act is out of this case.

3 The issue, again, came up in Eggs. I mentioned Eggs
4 with respect to the first Motion. But, Judge Pratter also
5 granted a Motion in Limine barring arguments about the
6 Capper-Volstead Act Immunity. And she barred that, even though
7 the Defendants, in their Motion in Limine, suggested that there
8 had been an issue that had not been considered on Summary
9 Judgment.

10 And she said, while that issue wasn't raised on
11 Summary Judgment, I ruled on Summary Judgment that there was no
12 Capper-Volstead Act Immunity. The Defendants cannot raise that
13 issue during trial, because it's been decided.

14 Now, it's true that there's some documents that are
15 on the Exhibit List that refer to the Capper-Volstead Act, and
16 might refer to some of the Lawyers that were involved. I mean,
17 obviously, those things are going to need to be adjusted.

18 We didn't know how Your Honor was going to rule in
19 these Motions. And we put together an Exhibit List that could
20 address any possible issue -

21 THE COURT: Well, we can deal -

22 MR. REFSIN: - that might come up.

23 THE COURT: - with that at Instructions to the
24 jurors.

25 MR. REFSIN: Excuse me?

1 THE COURT: We can deal with that -

2 MR. REFSIN: Yeah.

3 THE COURT: - by proposing Instructions that -

4 MR. REFSIN: Well, I think some of that can be dealt
5 with in Instructions. And it might also be possible, on
6 certain documents, to redact them, if they raise issues that
7 Your Honor rules shouldn't be presented to the Defendants. And
8 we will work -- or to the jury.

9 And we will work with the Defendants to make sure
10 that those issues are eliminated from the Exhibits, if
11 Your Honor agrees with us that those issues have been decided
12 and should be out of the case.

13 THE COURT: All right.

14 MR. REFSIN: And let me just end by saying that,
15 again, the fact that Lawyers gave advice on an immunity from
16 the Antitrust Laws that said it's not that -- the
17 Capper-Volstead Act doesn't say that price fixing, and supply
18 control is a procompetitive issue. It recognizes that this
19 kind of conduct might be anticompetitive. But it says, we
20 grant an exemption from it.

21 So, legal advice about whether that exemption from
22 the competitive rules of the Antitrust Laws doesn't say
23 anything about whether the conduct is competitive or
24 anticompetitive. It's an exception from the Antitrust Laws.

25 So, it doesn't help anybody to interpret the facts

1 under the Rule of Reason, because the Capper-Volstead Act is an
2 exception from the Antitrust Laws. And I just want to repeat
3 again that we do believe it would be unduly prejudicial to tell
4 the jury about an exception from the Antitrust Laws that
5 clearly doesn't apply in this case.

6 THE COURT: All right.

7 MR. REFSIN: Thank you.

8 MR. JOHNSON: Thank you, Your Honor. I'll be very
9 brief in response. We're not claiming an immunity under
10 Capper-Volstead.

11 We will abide by Judge O'Neill's Ruling for this
12 trial. And you won't hear anything to the contrary from us on
13 that. And to be quite frank, Judge Pratter's Ruling in Eggs
14 actually supports us on this. She said you -

15 THE COURT: Good. Well, let's get cracking, then.

16 MR. JOHNSON: Okay. It's a good point, Your Honor.
17 I appreciate it.

18 THE COURT: All right, good.

19 MR. JOHNSON: In that case, she said you cannot
20 introduce evidence to show the Capper-Volstead Immunity. But,
21 the documents may be admissible for another lawful purpose.
22 That's what we seek to do here: admit them, just as part of
23 the wholistic framework required by the Rule of Reason.

24 It's funny. There's a lot of reference to
25 Judge O'Neill rejecting Reconsideration Motions. And in our

1 view, what this is, is kind of a last-minute attempt, before
2 trial, to get the Per Se Rule on the Price-Fixing Claims by
3 taking relevant evidence out of the mix.

4 And we would ask Your Honor to reject that attempt.
5 The Rule of Reason requires an analysis of all the
6 circumstances of the case. And that includes the fact of
7 attempted Capper-Volstead compliance, whether it was successful
8 or not.

9 With respect to the proposition that these references
10 in their documents and the deposition testimony can simply be
11 redacted to remove references to Capper-Volstead. The Rule of
12 Completeness doesn't allow for that, Your Honor.

13 You can't just ask somebody to cover up one eye and
14 look at something else. It requires that you look at the
15 entire document out of fairness to us and to our Clients.

16 Finally, I would just, again, submit that a Limiting
17 Instruction saying you can't consider any evidence of attempted
18 Capper-Volstead compliance with respect to the Immunity Defense
19 is the way to go in this case, not to categorically exclude,
20 prematurely, any and all such relevant evidence. Thank you.

21 THE COURT: All right. Now, Plaintiffs, make
22 argument on your Motion to Preclude Defendants from Presenting
23 Evidence, or Arguing that Price-Fixing was Justified by a
24 Desire to Avoid Financial Ruin, or Their Financial Condition,
25 which is your ECF Number 958.

1 MR. REFSIN: Yes, Your Honor. Thank you.

2 Barry Refsin for the Direct Purchaser Class. And this is an
3 issue, again, that involves the application of the Rule of
4 Reason to the Price-Fixing Claims. And this is an issue that
5 has run throughout this case.

6 Almost every Brief that the Defendants file in this
7 case make the argument that they had to engage in price-fixing
8 in this case, because they were going out of business. And if
9 they didn't price-fix in 2000 and 2001, they would have gone
10 out of business.

11 They've continued to make that argument. We cite a
12 lot of Briefs in our Motion in Limine where they make their
13 argument.

14 They've continued to make that argument in the
15 Motions in Limine that they filed right now. In fact, in
16 opposition to the Motion in Limine Number 1 that we talked
17 about already, they made the following statement.

18 They said, by way of background, during the relevant
19 period, and regrettably still, the industry faced widespread
20 turmoil and unprofitability. In an attempt to salvage the
21 industry, Defendants endeavored to form the EMMC as a proper
22 cooperative, under the Capper-Volstead Act, to promote
23 efficiencies and competition in the market for fresh Agaricus
24 mushrooms.

25 We think that, if the Court doesn't grant this

1 Motion, that's exactly the argument that we're going to hear in
2 the Defendants' opening at trial. And we think that that's an
3 argument that is one that is clearly precluded by the
4 applicable Supreme Court Law, and Third Circuit Law.

5 The Rule of Reason allows Defendants to justify the
6 anticompetitive effects of conduct. But it doesn't permit any
7 argument that they possibly come up with.

8 There's certain types of attempted justifications
9 that the law clearly doesn't prevent at trial, in order to
10 defend a Rule of Reason case. Like I already said, the
11 relevant inquiry in the Rule of Reason is whether the
12 challenged conduct increases competition, or decreases
13 competition.

14 THE COURT: Or is unreasonable.

15 MR. REFSIN: You're right. It's -

16 THE COURT: Unreasonable.

17 MR. REFSIN: Yeah, it's an unreasonable restraint on
18 competition.

19 THE COURT: Right.

20 MR. REFSIN: It's not a general consideration of
21 whether it was a good business decision. I mean, very often -

22 THE COURT: Well, it says being unreasonable would
23 be a bad business decision.

24 MR. REFSIN: Yeah. I guess I would differ a little
25 bit with that framing of the issue. It may be a good business

1 decision to conspire with your Competitor, because it would
2 improve your profitability in the case. Now, it's a bad
3 decision, if you get caught and you get sued for conspiracy.

4 So, the issue isn't whether it's something that's
5 profitable for you. It's whether it's a reasonable restraint
6 on competition. Is it something that's good for competition,
7 or bad for competition?

8 And as Judge O'Neill pointed out in the Mushroom
9 case, and this also runs all throughout the Third Circuit cases
10 and the Supreme Court cases, there are three steps to the Rule
11 of Reason.

12 The first step, the Plaintiffs have a burden to show
13 anticompetitive effects. And then, it's the Defendants' burden
14 to show that the conduct promotes a sufficiently procompetitive
15 justification. And then, if they do that, the Plaintiffs,
16 then, have a burden to show that the restraint wasn't
17 reasonably necessary to achieve the procompetitive objective.

18 Now, the Defendants are saying that, in that second
19 step -- their burden to show procompetitive justifications --
20 they can show that, without the price-fixing, that they would
21 have gone out of business, and that it was procompetitive,
22 because, by price-fixing, they were able to stay in business.

23 That's precisely the kind of justification that the
24 Supreme Court has said is impermissible. It's often said that
25 the Antitrust Laws protect competition and not Competitors.

1 The argument that the Defendants are making is that,
2 if they had to compete with each other, they would go out of
3 business. They're making an argument that it would be good for
4 -- that it was good for them to fix prices and stay in
5 business.

6 The Supreme Court has rejected that justification
7 over and over. It rejected it in the NCAA case. It rejected
8 it in the National Society of Professional Engineers case. And
9 it rejected it in Goldfarb v. Virginia State Bar.

10 Those are all Rule of Reason cases where the
11 Defendants argued that they took some step that limited
12 competition. And they claimed that it was good for them, and
13 helped them to compete.

14 The Goldfarb v. Virginia State Bar case, for
15 instance, was a case where a Bar Association published a
16 Minimum Fee Schedule and said that that was designed to avoid
17 the economic suicide of the Lawyers.

18 The Supreme Court said, that's not permissible.
19 You're saying that you don't want to compete with each other.
20 The Third Circuit agrees that that kind of argument is not
21 permissible, as a procompetitive justification.

22 In the LePage's case at 324 F.3d 141, the Court said
23 that a defense that the Defendant was merely acting in
24 furtherance of its economic interests doesn't constitute the
25 type of business justification as that is an acceptable defense

1 to anticompetitive conduct.

2 And the Ninth Circuit made this point very clear.
3 This is a case that we cite in our Brief. It's Freeman v.
4 San Diego Association of Realtors, 322 F.3d 1133, at 1152,
5 note 24.

6 The Court said -- and this is a quote, indeed:

7 "If there is any argument the Sherman Act
8 indisputably forecloses, it is that price fixing is
9 necessary to save companies from losses they would
10 suffer in a competitive market. While a competitor
11 who fixes prices to stem his losses may be a more
12 sympathetic character than one who does so to fatten
13 his purse, he enjoys no favored legal position."

14 That's the argument that the Defendants are making.
15 It's one that's not permissible under the Rule of Reason. And
16 we think it should be precluded at trial.

17 The Defendants don't have a single case where they
18 say that kind of argument is appropriate. They cite cases.
19 But none of them involve this idea that they needed to fix
20 prices in order to stay in business.

21 The last point I'll make, again, is that there's a
22 serious Rule 403 prejudice issue here, if the Defendants are
23 able to argue to the jury that they deserve sympathy, because
24 they were going out of business, and, therefore, should be
25 allowed to restrict competition by engaging in price-fixing.

1 That's an issue that can't completely be corrected
2 with an Instruction. I mean, that goes to the heart of the
3 Antitrust Laws. It's an argument that's not permissible under
4 applicable law. And we believe it should be precluded.

5 THE COURT: All right.

6 MR. REFSIN: Thank you.

7 THE COURT: Let me -

8 GEOFFREY RICHARD JOHNSON: Good morning, Your Honor.
9 Geoff Johnson, Sr. for Defendants. It's very kind of
10 Mr. Refsin to write our opening statement and explain our
11 theories to the -

12 THE COURT: He won't bill you for it.

13 MR. GEOFFREY JOHNSON: - Court. Well, we wouldn't
14 pay it, because it's not our opening statement and it's not our
15 theories.

16 The evidence that Plaintiffs seek to preclude -- and
17 actually, I'm not even sure it's evidence. It's this vague
18 notion, this category of financial condition and financial
19 ruin.

20 That's not what our evidence will be. And for that
21 reason, this vague category that they seek to preclude the
22 evidence on, which is, in effect, seeking a reconsideration of
23 Judge O'Neill's Order on Rule of Reason, Your Honor ought to
24 deny this as premature and vague.

25 Here's the real reason for the evidence and the

1 evidence that's going to be presented. We're not going to use
2 evidence of financial condition to argue that price restraints
3 were needed to prevent competition.

4 Our evidence is going to show that price restraints
5 prevented further farm closures, which promoted competition.
6 The alleged restraints arguably benefitted consumer welfare by
7 facilitating new, diversified products, promoting consumer
8 choice, and improving industry-wide production efficiencies.
9 That's why evidence of financial condition is going to be
10 relevant in this trial.

11 I would point out, Your Honor, that this is an
12 antitrust case. It's all about financial condition. The
13 financial data is an essential part of Plaintiffs' Expert
14 Report. How can they say we're going to exclude this evidence,
15 when it becomes part of their own case?

16 There are other issues as to which the finances are
17 relevant. Evidence of the Defendants' market power is a key
18 issue.

19 Evidence of the implementation and effective price
20 restraints, and the bargaining power of the Growers against
21 large Retailers: essential issue in this case. And how can
22 you present that without having some indication of the
23 financial condition of the Defendants?

24 As I said, Your Honor, this is, effectively, a Motion
25 for Reconsideration disguised of Judge O'Neill's Order that the

1 Rule of Reason applies to the Price-Fixing Claim. What they're
2 doing is taking that Ruling and trying to exclude evidence,
3 piece-by-piece, that supports that Ruling, and have you ignore
4 Supreme Court Holdings that say, in the Rule of Reason, you
5 must consider the industry as a whole, and look at the history
6 of the industry.

7 So, for these reasons: one, vague Claim for relief;
8 two, seeking reconsideration; three, ignoring the Rule of
9 Reason; four, ignoring the procompetitive aspects of our
10 evidence that we're going to present; and finally, five, and,
11 frankly, in the Eggs case, this evidence was permitted by
12 specific Ruling of Judge Pratter. So, for all these reasons,
13 Your Honor, we'd ask you to deny this Motion.

14 THE COURT: All right.

15 MR. MONTAGUE: Your Honor, may I be heard for one
16 brief minute on this?

17 THE COURT: You got something new to say?

18 MR. MONTAGUE: Yes.

19 THE COURT: All right.

20 MR. MONTAGUE: Thank you, Your Honor. I just want
21 to call the Court's attention to the seminal case that really
22 governs this issue that no one has mentioned. And that is the
23 Board of Trade of the City of Chicago, and Judge Brandeis'
24 Decision of 1918, which is still good law.

25 And I'd just like to read a little bit from the

1 conclusion of that. The Supreme Court says, to determine that
2 -- this is a Rule of Reason case, where there were Rules on the
3 Board of Trade which dealt with calls which dealt with price.

4 "To determine [that] question, the court must
5 ordinarily consider the facts peculiar to the
6 business [to which the restraint is applied], its
7 condition before and after the restraint was imposed,
8 the nature of the restraint, and its effect [and]
9 actual or probable.

10 "The history of the restraint, the evil believed to
11 exist, the reason for adopting the particular remedy,
12 the purpose or end sought to be [obtained], are all
13 relevant facts. [It is] not because a good intention
14 will save an otherwise objectional regulation or the
15 reverse."

16 This is the most important:

17 "But because knowledge of intent may help the court
18 to interpret facts and [to] predict consequences."

19 The District Court erred, therefore, in striking from
20 the answer:

21 "Allegations concerning the history and purpose of
22 the 'Call' rule, and [in later excluding] evidence on
23 that subject."

24 Now, their evidence is replete, Your Honor, with
25 references to the EMMC as a cooperative, of the Capper-Volstead

1 Act. And the jury, they're going to hear the words
2 "cooperative".

3 They're going to hear the Capper-Volstead Act.
4 They're going to hear price-fixing. They're going to hear
5 minimum price schedule. They have no idea what the foundation
6 for that.

7 As Mr. Johnson said, we're not claiming immunity.
8 We're just having the jury understand the background, the
9 history, and the purpose and effect of what was done, so they
10 have an understanding, under the Rule of Reason.

11 And the Decisions that were cited of Judge O'Neill
12 were all before he ruled on the Rule of Reason issue. Thank
13 you.

14 THE COURT: All right. Plaintiffs, you may make
15 your argument regarding your Motion to Exclude Evidence or
16 Argument Regarding Individual Issues Unique to Opt-Out
17 Plaintiffs, Publix and Giant Eagle.

18 MR. REFSIN: Yes, Your Honor. Thank you.
19 Barry Refsin, again; and I will do that in just one moment. I
20 would just like to respond briefly to one point that
21 Mr. Montague made.

22 I mean, he said that Chicago Board of Trade governs
23 this case. It's a 1918 case. There's been a lot said on the
24 Rule of Reason since 1918, including an Opinion by the
25 Third Circuit that I referred to earlier in the Lipitor case.

1 It's Lipitor Antitrust Litigation, 868 F.3d 231. And
2 the Third Circuit there told us what the Third Circuit's
3 treatment of the Chicago Board of Trade's case was. And this
4 is what the Third Circuit said about the Chicago Board of Trade
5 case.

6 It said, intent is not an element -- and this is a
7 quote:

8 "Intent is not an element of an Antitrust Claim. And
9 benign intent does not shield anticompetitive conduct
10 from liability. A Party's good intention cannot save
11 an otherwise objectionable restraint of trade."

12 And it cites Chicago Board of Trade v. United States,
13 the case that Mr. Montague just cited. It, then, said:

14 "The antitrust inquiry is confined to a consideration
15 of impact on competitive conditions."

16 And it cites the National Society of Professional
17 Engineers case from the Supreme Court that I referred to. And
18 then, it continues:

19 "And good motives will not validate an otherwise
20 anticompetitive practices."

21 And it cites the NCAA case that I also referred to.
22 It's clear that, when a Defendant is arguing that it needs to
23 fix prices to stay in business, even if it's arguing that it's
24 going to give consumers more options -- that's exactly what the
25 argument was in the Lawyer's case in the Supreme Court that I

1 referred to -- that's an impermissible argument.

2 That's an argument that competition isn't good
3 enough. And that's not the basis of our Antitrust Laws. The
4 basis of our Antitrust Laws is competition.

5 If people can't survive under competition, they go
6 out of business. That's the effect of competition. You don't
7 get to argue, under the Sherman Act, that you needed to fix
8 prices in order to stay in business. That's a prohibited
9 justification. And that's not -

10 THE COURT: All right.

11 MR. REFSIN: - an argument -

12 THE COURT: Go onto your -

13 MR. REFSIN: - that Judge Pratter -

14 THE COURT: - next -

15 MR. REFSIN: - dealt with.

16 THE COURT: Go onto the next point, Mr. -

17 MR. REFSIN: Let me move onto the next Motion. And
18 that Motion deals with the Opt-Outs. Everybody agreed, when we
19 set up the trial structure in this case, that the Opt-Outs
20 would not be included in this trial. That's why the Court
21 bifurcated the trial.

22 But, despite the fact that we have a bifurcated
23 trial, the Defendants' Witness List, Exhibit List, and
24 Deposition Designations show that they intend to offer
25 substantial evidence about Publix and Giant Eagle in the Class

1 case, even though those Entities opted out of the Class. The
2 evidence about Giant Eagle and Publix is completely irrelevant
3 and should be included.

4 THE COURT: Well, let me -

5 MR. REFSIN: Excluded.

6 THE COURT: - ask you. Why should I preclude
7 Dr. David from testifying to his general analysis of the
8 mushroom industry?

9 MR. REFSIN: Well, because Dr. David, in his Report,
10 said that his Report had nothing to do with the Class trial.
11 His Report -

12 THE COURT: Listen to what I'm asking. Why should I
13 preclude Dr. David from testifying to his general analysis of
14 the mushroom industry?

15 MR. REFSIN: Because he offered an analysis in
16 response to the Opt-Out Experts; he didn't give us a Report
17 that said he was giving us any expert analysis that applied to
18 the Class case. His Expert Report -

19 THE COURT: Forget the Class case. He's talking
20 about the mushroom industry.

21 MR. REFSIN: No. But, he's not. He has an Expert
22 Report that begins with the Docket Numbers from the Opt-Out
23 case. And this is what he says in the very first paragraph of
24 his Report. He said that his Report is about:

25 "Opt-Out Plaintiffs in this action, Giant Eagle, Inc.

1 (Giant Eagle), and Publix Super Market, Inc.
2 (Publix), collectively Plaintiffs, have accused the
3 Eastern Mushroom Marketing Cooperative, together with
4 EMMC Members and various Non-Members Entities, of a
5 conspiracy to fix prices and control the supply of
6 fresh Agaricus mushrooms in the Eastern United
7 States."

8 And then, in paragraph 2, he says:

9 "I have been asked by Counsel for certain Defendants
10 in this Action to analyze the opinions of Plaintiffs'
11 Experts, Dr. Keith Leffler and Dr. Paul Prentice, as
12 expressed in these Expert Reports."

13 There was no disclosure in Dr. David's Expert Report
14 that he was offering any opinion against the Class Plaintiffs.
15 And while we attended the depositions, we didn't ask any
16 questions, because he was giving an opinion that didn't apply
17 to our case.

18 Now, they have a separate Expert, Dr. Johnson, who
19 gave opinions about the Class Claims. If there was some
20 general evidence that was applicable to us, Dr. Johnson could
21 have included it in his Report, or they could have had
22 Dr. David say that he was offering opinions applicable to the
23 Class case.

24 But that's not what they did. They have a Report
25 that says he's responding to opinions in the Opt-Out case. And

1 given that we've now bifurcated the case, there's no reason for
2 them to now bring an Expert in who was not disclosed as an
3 Expert in the Class case to testify in the Class case.

4 In fact, all the Parties agreed that there should be
5 separate trials in the Class case and the Opt-Out case, because
6 of the potential prejudice associated with trying the Class and
7 the Opt-Out cases together. So, there's no reason now to
8 permit the Defendants to ambush the Class Plaintiffs by
9 injecting those individual issues into the Class case -

10 THE COURT: All right.

11 MR. REFSIN: - on the eve of trial.

12 THE COURT: Let me hear from Defendants.

13 TERRI PAWELSKI: Good morning, Your Honor.

14 Terri Pawelski from Stevens & Lee. I think Your Honor has
15 already touched upon the exact issue, which forms the response
16 to our Motion.

17 First of all, Dr. David comes as no surprise to the
18 Class Plaintiffs. He's been around in this case since the
19 beginning of time.

20 They've had his Report. And if, you know, Mr. Refsin
21 selectively read from the first two paragraphs of his Report,
22 obviously there's a lot more to his Report than that.

23 We don't want to try the Opt-Out case, or the Opt-Out
24 issues in the Class Plaintiff trial. That would be of no use
25 to us.

1 But there certainly are issues relevant to the
2 overall mushroom industry, which Your Honor asked, and which I
3 didn't hear a clear answer given by Mr. Refsin, which should
4 not be precluded.

5 For example, Your Honor, Dr. David prepared mass data
6 charts, relevant to the entire mushroom industry, which were
7 used by Mr. DeStefano in the Class Certification hearing. So,
8 he does opine upon several issues that are relevant to the
9 entire industry.

10 And that is the only testimony which we are looking
11 to put before the jury in the Class Plaintiff case. And you
12 know, if there is an objection that something has gone too far
13 as to the Opt-Outs, or not relevant, that can certainly be
14 made.

15 But to say that this is any sort of ambush, or that
16 they haven't had his Report for years upon years, and that
17 there are not issues germane to the mushroom industry at-large,
18 is simply false, Your Honor.

19 So, we would ask that Dr. David, at this point in
20 time, not be precluded from the opinions that he has issued,
21 and which the Plaintiffs have had for years. Unless Your Honor
22 has any more questions, I think I can leave it at that.

23 THE COURT: Leave it at that.

24 MS. PAWELSKI: Excellent; thank you, Your Honor.

25 THE COURT: Now, I want to move on to -

1 MR. MONTAGUE: Your Honor -

2 THE COURT: - some of the -

3 MR. MONTAGUE: - may I just add one thing?

4 THE COURT: You keep interjecting.

5 MR. MONTAGUE: I know.

6 THE COURT: What are you, Columbo? Go ahead.

7 MR. MONTAGUE: Thank you, Your Honor. I just want
8 to point out that, during the Rule of Reason argument that we
9 had, before Judge O'Neill, I proffered and discussed three of
10 Jesse David's charts, using his name. And there was no
11 objection by Counsel for the Class.

12 THE COURT: All right. Let's talk about some of the
13 Defendants' Motions. Plaintiffs have requested to make
14 argument about Defendants' Motion to Preclude Admission of EMMC
15 Meeting Materials as Business Records, which is ECF Number 950.
16 Plaintiff?

17 MR. REFSIN: And I think it's Defendant's Motion.

18 THE COURT: Oh, okay.

19 MR. REFSIN: So, I think they should probably go
20 first.

21 THE COURT: Go ahead.

22 (Asides)

23 MR. DESTEFANO: Benefits of age. Anyway,
24 Your Honor -

25 THE COURT: To what?

1 MR. DESTEFANO: I said the benefits of age.

2 THE COURT: What benefit is that?

3 MR. DESTEFANO: You can have younger people do your
4 work for you.

5 THE COURT: Oh, okay. I didn't know. I was
6 thinking about age.

7 MR. DESTEFANO: Anyway, sir, I think -

8 THE COURT: Trying to -

9 MR. DESTEFANO: - this is -

10 THE COURT: I'm trying to martial the evidence for
11 benefits.

12 MR. DESTEFANO: Right.

13 THE COURT: Go ahead.

14 MR. DESTEFANO: I'm trying martial evidence for
15 benefits. But, in any event, sir, straightforward Motion;
16 there's been no foundation suggested by the Defendants -- I'm
17 sorry, by the Plaintiffs for the admission of these documents
18 as business records.

19 If the Defendants care to lay the proper foundation
20 at trial, then, of course, we would not object, or to overcome
21 an objection. To make matters plain, these are hearsay,
22 Your Honor.

23 They don't qualify as business records. For starters
24 -- and this may be the start and the end of the analysis --
25 although there was evidence of the time of the meeting, there's

1 no evidence as to when these notes were made, and when they
2 were transcribed. And they want to admit the transcribed
3 version of the notes. So, they don't qualify prima facie as
4 business records, first of all.

5 Secondly, we concede in our Motion that, if there can
6 be some other foundation made for the admission of these
7 Minutes Notes, or I think they're mostly referred to as meeting
8 notes, obviously they would come in.

9 I mean, the most obvious of foundations would be they
10 may come in as an admission of a Party Opponent. They may also
11 come in as statements of a Co-Conspirator made during the
12 course of, or in furtherance of a Co-Conspirator.

13 The problem with that is that the notes do not
14 attribute any statement to any individual. You almost have to
15 look at them. But, I think the bottom line here -

16 THE COURT: I hope that's what people do.

17 MR. DESTEFANO: Yeah. The bottom line here -

18 THE COURT: Look at them.

19 MR. DESTEFANO: - is that, you know, we have
20 meet-and-confer obligations with respect to these Exhibits. A
21 lot of these Minute Notes, they got these.

22 If they come up with an obvious foundation that they
23 can articulate to us, even before trial, we won't object. But,
24 I think that that foundation has to be laid somewhere.

25 THE COURT: Here's an invitation.

1 MR. DESTEFANO: Yeah, it's -

2 THE COURT: Mr. Refsin, he made an invitation to
3 you.

4 MR. DESTEFANO: I made an invitation.

5 MR. REFSIN: And I -

6 MR. DESTEFANO: So -

7 MR. REFSIN: I'll take him up when I -

8 THE COURT: Oh, good.

9 MR. REFSIN: - get to stand up.

10 THE COURT: Well, I hope -

11 MR. DESTEFANO: - to decide this -

12 THE COURT: - you do.

13 MR. DESTEFANO: - in a vacuum now would probably be
14 improper. And each document is a specific document. Whether
15 it qualifies under the Business Records Exception -

16 THE COURT: What I'm getting from your argument is
17 that you haven't really sat down to go over whether some of
18 these records are actually admissible.

19 MR. DESTEFANO: Right; correct.

20 THE COURT: Why not?

21 MR. DESTEFANO: Well, because it -

22 THE COURT: We've been around for years.

23 MR. DESTEFANO: Well, we just exchanged each
24 other's -

25 THE COURT: Oh, okay.

1 MR. DESTEFANO: - Exhibits.

2 THE COURT: This is something that I think you guys
3 can come to some reasonable decision about.

4 MR. DESTEFANO: It's quite possible that we will.
5 But we haven't done that. And to -

6 THE COURT: All right.

7 MR. DESTEFANO: - ask the Court now to make a
8 blanket Ruling -

9 THE COURT: Well, why don't you let me know? Sit
10 down and talk about it, and let me know, before I rule on it.

11 MR. DESTEFANO: We will.

12 THE COURT: All right. Go ahead, Mr. Refsin.

13 MR. REFSIN: Okay. Thank you, Your Honor. And
14 Mr. DeStefano began by saying that he's not asking for any
15 categorical Ruling on these Minutes of the MMC meetings and the
16 Agendas for these meetings.

17 I mean, he is asking for categor [phonetic] Ruling
18 that they are not business records. And we think that there's
19 a foundation that's already been established. And we make it
20 in our submission, showing that these documents are, in fact,
21 business records. And they also satisfy the other separate
22 exceptions to the Hearsay Rules.

23 And we initially began by responding to the request
24 to categorically deny these meeting materials. But we
25 realized, in putting together our Brief, that the record that

1 we have in this case is so complete that we think that, at
2 least for the documents that the Defendants identified as
3 Exhibits, as examples of the meeting materials, that the Court
4 can actually rule on the admissibility of the materials that
5 the Defendants identified as examples in their Brief.

6 And we think that would be very useful, because there
7 are a lot of other materials just like this that the Defendants
8 say don't satisfy the Business Records Exception, but that the
9 record clearly establishes that they, on their face, together
10 with testimony in this case, they're business records.

11 And I'd like to just make it clear what these
12 documents are. They're really two types of documents that the
13 Defendants identify in their Motion.

14 First, they're Agendas of the EMMC meetings. And
15 these are the meetings where the Defendants got together. They
16 came up with pricing rules and the prices that they were
17 fixing, and decided on the Supply-Control Assessments.

18 And what they would do would be, before every monthly
19 meeting, they would send out a printed Agenda with the date of
20 the meeting on top of it, and the issues that they were going
21 to discuss at that meeting.

22 And then, according to their Bylaws, they were
23 required to keep Meeting Minutes for those meetings. And
24 that's the second type of document.

25 Mr. DeStefano called them notes. But they're the

1 Meeting Minutes that they compiled, in accordance with their
2 Bylaws. And they were compiled, according to the testimony, by
3 an Office Manager that they hired to keep the notes.

4 And according to the Bylaws, those notes were
5 available to all Members. They identified at the top every
6 single EMMC Member that attended. And the Bylaws required
7 every Member to attend every meeting every month. And if a
8 Member missed more than, I think, one meeting, they were fined
9 for not attending the meetings.

10 So, these aren't like the documents in the cases that
11 the Defendants identify where they're just handwritten notes
12 with no dates on them. I mean, these are the formal documents
13 that the EMMC operated its business by. And this is exactly
14 the kind of document that satisfy the Business Records
15 Exception.

16 Now, one of the objections that the Defendants make
17 to admitting them as business records is that there's not
18 adequate authentication. But it's clear that, in the
19 Third Circuit, that business records can be admitted under the
20 Business Records Exception in Rule 803.6 without any witness at
21 all.

22 There's some documents that are authenticated on
23 their face. And if you look at the documents that are attached
24 to the Defendant's Motion, these are the kinds of documents
25 that the Third Circuit found are authentic on their face.

1 In the Japanese Electric Products Antitrust
2 Litigation, at 723 F.2d 238, the Third Circuit dealt with
3 Minutes actually of meetings that were accused of being
4 price-fixing meetings, just like the ones here. And the Court
5 looked at the Minutes and said, on their face, that, under the
6 totality of the circumstances, these documents were Meeting
7 Minutes and they satisfied the Business Records Exception.

8 We have this testimony about how the Agendas were
9 circulated, the regularity of them, how the Minutes were
10 circulated and their regularity. That's the kind of evidence
11 that the Third Circuit found in the Japanese Products Antitrust
12 Litigation is appropriate for authentication, and supported
13 their admission under the Business Records Exception.

14 Mr. DeStefano also mentioned that there's a question
15 about timeliness. There's no issue about the timeliness of
16 these documents.

17 On their face, the Agendas have dates on them. The
18 Minutes have dates on them. There's no indication in the
19 record that they were created any significant amount out of
20 time after the dates, on their face.

21 I mean, there's a Processed Eggs case out there on
22 Business Records. But this is another case in which we have a
23 different, from the Processed Eggs case.

24 In the Egg Products case, there were informal emails
25 that were exchanged that discussed certain meetings. These

1 aren't informal notes or emails. These are the actual Minutes
2 that were required to be kept by the EMMC Bylaws. And they
3 were made available -

4 THE COURT: I read your Motions -

5 MR. REFSIN: - to all the Members.

6 THE COURT: - on this, both sides.

7 MR. REFSIN: But -

8 THE COURT: At the time of trial, I sure hope you've
9 gotten together beforehand, because this, to me, is something
10 that shouldn't even be a debate. So -

11 MR. REFSIN: Yeah, I actually agree, Your Honor,
12 that I'm surprised that they objected on business records.
13 This seems like a clear issue. And -

14 THE COURT: So -

15 MR. REFSIN: - that's really why we asked for a
16 Ruling on the ones that they attached, because it seems so
17 clear that they're business records.

18 THE COURT: - I expect you to get together and reach
19 agreement on this.

20 MR. REFSIN: Okay.

21 THE COURT: Okay?

22 MR. REFSIN: Thank you. There are also a lot of
23 other reasons for their admission. But we won't -

24 THE COURT: I -

25 MR. REFSIN: - discuss that.

1 THE COURT: - understand. Defendants -

2 MR. DESTEFANO: May we have a brief -

3 THE COURT: - you -

4 MR. DESTEFANO: - rebuttal?

5 THE COURT: What's that?

6 MR. REFSIN: No.

7 MR. DESTEFANO: May we have a couple minutes of
8 rebuttal for that?

9 THE COURT: I understand the issue. I don't need
10 rebuttal. What I want is you guys get together and decide
11 which of the records you think are okay to be admitted.

12 Now, we want to talk about a Motion to Preclude
13 Admission of Discovery Deposition Testimony. Now, I want to
14 know who you intend to introduce, what witnesses' depositions
15 you want to introduce. And my concern is the jury.

16 I don't want them to become disengaged. So I want to
17 get more information about which witnesses, and how long the
18 relevant portion of the deposition is, whether it's videotaped
19 or not. And if I were going to limit the number of witnesses,
20 which witnesses would you prioritize in using deposition
21 testimony for? Have you discussed this at all?

22 MS. PAWELSKI: To some degree, we have. But there's
23 still enough room where we can't come to -

24 THE COURT: How many depositions do you intend to
25 introduce?

1 MS. PAWELSKI: We filed the Motion to Preclude
2 Plaintiffs from -

3 THE COURT: Okay.

4 MS. PAWELSKI: So it's a little bit opposite of what
5 you're asking. We filed the Motion to have all witnesses -

6 THE COURT: Mr. Refsin -

7 MS. PAWELSKI: - come live.

8 THE COURT: - how many witnesses' depositions do you
9 intend to read to the jury, or -

10 MR. REFSIN: Well -

11 THE COURT: - show videotapes, or -

12 MR. REFSIN: Yeah, we intend to use videotape.

13 Virtually all of these witnesses have been videotaped. I don't
14 have an exact count. But I hesitate to give you an estimate.
15 I'm not sure exactly what -

16 THE COURT: Well, I want to know -

17 MR. REFSIN: - it is.

18 THE COURT: - for just the economy of time. I don't
19 want to have jurors sitting there watching a deposition, which
20 I know is going to be exciting.

21 MR. REFSIN: Yeah, just to give you a little bit of
22 comfort -- I hope this gives you some comfort -- I mean, we've
23 done this in other big antitrust cases. And we recognize we're
24 not playing an entire deposition to the jury. I hope you
25 didn't think that's what we were asking to do.

1 THE COURT: I don't know what you were asking.

2 MR. REFSIN: No, what we intend to do, we usually
3 edit these videotaped Deposition Designations down to something
4 less than 45 minutes, because we realize asking a jury to
5 listen to more than 45 minutes -- 45 minutes is probably
6 pressing the jury's attention on a videotaped deposition.

7 So what we generally do on videotaped deposition is
8 edit them down as short as possible. We identify any
9 objections that remain in the deposition testimony, after
10 meeting and conferring with the Defendants, and ask Your Honor
11 to rule on those objections before it's played to the jury.

12 So it generally goes very smoothly. Really, usually,
13 the videotaped depositions go much faster than the live
14 testimony.

15 Now, we do intend to offer live witnesses, as well.
16 I mean, it's not a completely deposition-driven case. But, we
17 believe that, under Rule 32, we're entitled to use the
18 depositions of Officers, Directors, Managing Agents -

19 THE COURT: I understand that.

20 MR. REFSIN: - and Rule 36 -

21 THE COURT: I just want to be efficient.

22 MR. REFSIN: Yeah, we -

23 THE COURT: I don't want to bore the jurors.

24 MR. REFSIN: And we take that obligation very
25 seriously. And we do edit these very succinctly so to keep the

1 jury's attention. And one of the things that we thought we
2 would discuss with Your Honor today is the process that
3 Your Honor would like to adopt for ruling on objections to
4 videotaped depositions, so that all those objections are
5 resolved before -

6 THE COURT: Well, that's why -

7 MR. REFSIN: - we get there.

8 THE COURT: - she's here.

9 MS. PAWELSKI: Your Honor, first, I would like to
10 point out, these were discovery depositions, not trial
11 depositions. By rough estimate, there are approximately 24,
12 25 people listed by Class Plaintiffs to play the videos.

13 In addition to that, Mr. DeStefano and I have
14 received Subpoenas for these same people that they wish to call
15 -- or not wish to call. They would like to play by video.

16 I would like to also mention, to say that it's an
17 easy process to go through to edit these videotapes and play
18 them, and to have Your Honor decide on the objections that the
19 Parties can't come into agreement with, Mr. DeStefano were
20 Local Counsel in the Eggs case.

21 I can tell you that Judge Pratter had a nightmare
22 deciding which videos would be played, versus live testimony,
23 versus objections of the videotape. It is an enormous,
24 enormous task that Class Plaintiffs are asking you to take on.

25 Also, Your Honor, as you know, you have complete

1 discretion, regardless of the Federal Rules. It's your
2 decision whether to have the jury in the box looking at
3 somebody, assessing their credibility, their demeanor, on the
4 stand, or being bored to death watching video, after video,
5 after video.

6 We think that it's serves the purpose of judicial
7 economy and certainly helps the jury in assessing the witness'
8 credibility and demeanor. These are all people who are within
9 Subpoena Power of the Courthouse. And in fact, we've received
10 several Subpoenas at this point.

11 So, for all of those reasons, Your Honor, we believe
12 that the jury should hear live from the witnesses. And it can
13 save Your Honor a lot of work in deciding which parts of the
14 videos can be played.

15 MR. REFSIN: Yeah. Thank you, Your Honor. I mean,
16 first, with respect to the Subpoenas, I mean, we don't know how
17 Your Honor's going to resolve this issue. So we've served
18 Subpoenas to protect ourselves.

19 We think that we're entitled to use these depositions
20 for any purpose. We're dealing with depositions that qualify
21 under Federal Rule of Civil Procedure 32(a)(3), which has no
22 requirement for unavailability.

23 It says that if the witness is an Officer, Director,
24 Managing Agent, or witness designated under Rule 30(b)(6), that
25 deposition can be used for any purpose. This is not that great

1 an issue. It's really less work than having a live witness on
2 the stand.

3 We did this a couple of summers ago, in front of
4 Judge Goldberg in the Provigil trial. We had a procedure that
5 gave Judge Goldberg a package with the cutdown Designations,
6 the Exhibits that were being introduced during that witness'
7 testimony, and all the objections that any Party were still
8 maintaining.

9 And I think we gave that to Judge Goldberg maybe two
10 nights before the video deposition would be played. He ruled
11 on them. We had our Video Tech cut the videos down. And we
12 played them to the -

13 THE COURT: Where are these -

14 MR. REFSIN: - jury.

15 THE COURT: - witnesses?

16 MR. REFSIN: Well, we have some that are within
17 100 miles. So they qualify as available. They're all adverse
18 witnesses, though. Obviously they're not our witnesses.
19 They're the Defendants' witnesses.

20 I mean, and there are also some that are beyond
21 100 miles and are technically unavailable, and would fall
22 within 32(a)(4). So we're only talking in this Motion about
23 the ones who are available, because the ones that are
24 unavailable obviously qualify under 32(a)(4) as unavailable
25 witnesses. But there's really no reason to -

1 THE COURT: How many hours of testimony are you
2 talking about?

3 MR. REFSIN: Your Honor, I don't have that count
4 yet. And I mean, we've done the Designations on the -- you
5 know, we've exchanged Designations on the depositions with the
6 Defendants.

7 Those Designations are still overinclusive. I mean,
8 the way this works, in my experience, at least, is, as you get
9 closer to trial, you keep narrowing down the Deposition
10 Designations.

11 And we usually have a process where, a couple of days
12 before you would play the video, you would give the final
13 Designation -- exchange final Designations and work it out, you
14 know, what the counter-Designations are, and what objections
15 still remain.

16 And the reason you do it that way is because, based
17 on what happens at trial, you're able to narrow it further. So
18 this isn't an issue where I think it's a good idea to make
19 Rulings on these videotaped depositions until you get to trial
20 and you see, because they're always a lot narrower issues than
21 it looks like on the initial set of Designations.

22 I would like to point out that the events in this
23 case are very old. This is a case that has been going on for
24 13 years.

25 THE COURT: No kidding.

1 MR. REFSIN: The depositions took place a lot longer
2 ago. The depositions are a lot closer to the actual events
3 than live testimony at trial would be.

4 So I suspect that a lot of the live testimony -- if
5 you take live testimony from some of these people, a lot of
6 it's going to be spent refreshing the witness' recollection
7 with what he originally testified to. So it's really not more
8 efficient -

9 THE COURT: And what did these -

10 MR. REFSIN: - in this case.

11 THE COURT: - witnesses testify to?

12 MR. REFSIN: They testified to their participation
13 in the EMMC, and what they did in EMMC. These are the Managers
14 of each of the Defendant Companies.

15 They're the 30(b)(6) Designees, or the Officers of
16 the Company, mostly that attended the EMMC meetings. I mean,
17 these are not low-level employees. These are the high
18 upper-level employees of these Companies. In a lot of cases,
19 they're the Owners.

20 I actually think it would be more efficient to use
21 video in this case, because it's going to be a very short clip.
22 All the Exhibits are going to be pre-ruled on by the Court, in
23 the course of the Deposition Designation exchange. And you're
24 not going to have a lot of refreshing recollection, because
25 it's going to be the deposition that's played.

1 Yeah, I recognize that the Court has discretion to
2 manage the events at trial, and to avoid duplication. And
3 that's mostly what the Defendants' cases deal with.

4 They deal with cases where you had a witness that was
5 called, and then also video played. And that's not what we
6 intend to do.

7 We intend to make a choice between live testimony and
8 video deposition testimony. And if we use the video, we're not
9 going to have duplicate of live testimony for that
10 adverse witness. We will just play the video deposition.

11 Now, the Defendants might choose, in their case, when
12 they put on their evidence, they may call that witness live.
13 And we had that happen in the Provigil trial in front of
14 Judge Goldberg, too.

15 We put on a witness by videotape, based on the
16 deposition that was taken during discovery. We played, you
17 know, maybe 20 minutes of that deposition, of a high-level
18 Executive and one of the Defendants. And then, the Defendant
19 called that witness live in his case. And I would suspect that
20 that would be what would happen here.

21 But we don't think it's appropriate to just
22 categorically rule out that witnesses who qualify, under
23 Rule 32(a)(3), whose depositions can be used for any purposes,
24 should be ruled categorically not able to be presented by
25 deposition. Thank you.

1 MS. PAWELSKI: Your Honor, just very, very briefly.

2 THE COURT: Go ahead.

3 MS. PAWELSKI: Your Honor, it's entirely appropriate
4 to use your discretion to keep these depositions out of the
5 trial. And the Courts can't be clearer that you have complete
6 discretion to do so.

7 Moreover, Mr. Refsin is absolutely correct. These
8 are not only high-level company people. These are primarily
9 the Defendants who will either be in court, watching the trial,
10 because their businesses are at stake, or available upon very
11 short notice. So they will either be here, or can certainly be
12 in court.

13 I think Mr. Refsin is trying to oversell the fact
14 that the events which happened a long time ago will not be
15 remembered by these people. These people have been living this
16 case for 13 years. And it is closest to them than anyone else,
17 than any of the Lawyers, anyone else, because they've been so
18 intimidated and scared about what's been happening.

19 And again, I think he's somewhat overselling the fact
20 that we will all come to an agreement on which portions of
21 these depositions will be played. Remember, they're long,
22 rambling, discovery depositions, which Mr. DeStefano and I sat
23 through, years ago. And they are fraught -

24 THE COURT: You don't look -

25 MS. PAWELSKI: - with -

1 THE COURT: - that old.

2 MS. PAWELSKI: Thank you.

3 THE COURT: Oh, again. Sorry.

4 MS. PAWELSKI: Working with Mr. DeStefano has aged
5 me more than otherwise. But, they're long. We haven't -

6 THE COURT: Yeah, me, too.

7 MS. PAWELSKI: - come to any agreement. The
8 exchange has been riddled with objections on both sides. And I
9 truly believe -

10 THE COURT: Well, I'm going to -

11 MS. PAWELSKI: - Your Honor -

12 THE COURT: - tell you something. I expect you to
13 sit down, talk about the depositions, and decide: A, maybe
14 it's better to bring the person in, live; or, B, look at the
15 deposition, the video, and cut it down to its essentials.
16 That's it. I don't want to have a jury sitting there through a
17 bunch of videotapes from 13 years ago.

18 MS. PAWELSKI: Well, we don't think that's a good
19 idea, either. We want them live. If they're available, we
20 want them to come in, and we want the jury to hear them
21 testify, live. We want the jury to see these people.

22 THE COURT: Well, they're your people, aren't they,
23 most of them?

24 MS. PAWELSKI: Absolutely.

25 THE COURT: Yeah.

1 MS. PAWELSKI: Yes. They are. They're all our
2 people, Your Honor, and we want them live. They'll be here.
3 If Mr. Refsin tells me to bring them here on a certain day,
4 they'll be here.

5 THE COURT: There you go. Look at that.

6 MR. REFSIN: And Your Honor, they're entitled to
7 present them live, if they want, in their case. I mean, if
8 they come in, live, in their case, their testimony should be
9 limited.

10 Their cross examination should be narrowly limited to
11 the scope of the direct. And it's likely they're going to have
12 to testify twice.

13 I think that our approach is really the much more
14 efficient way to deal with it. It's not something that should
15 categorically be dealt with right now, in this Motion in
16 Limine.

17 THE COURT: It's not going to be categorically dealt
18 with. I expect you to deal with it, and come up with a
19 sensible solution. All right?

20 MS. PAWELSKI: Thank you, Your Honor.

21 (Asides)

22 THE COURT: Now, Defendants, you want to make
23 argument about your Motion to Prohibit Reference to Settlements
24 with Settling Defendants, Except for Impeachment Purposes?
25 Well, I think that's pretty clear. I mean, I don't -

1 MATTHEW BRUNELLI: But, Your Honor -

2 THE COURT: We're not going to talk about -

3 MR. BRUNELLI: - I think you're right.

4 THE COURT: - any amounts of settlement.

5 MR. BRUNELLI: I'm sorry?

6 THE COURT: We're not going to talk about any
7 amounts.

8 MR. BRUNELLI: Well, I think it's possible. I'm
9 sorry, Matthew Brunelli, also from Stevens & Lee. Your Honor,
10 I think the issue of whether a Settlement Agreement contained a
11 Cooperation Clause -

12 THE COURT: That's right. That's good.

13 MR. BRUNELLI: - as well as the amount of settlement
14 is relevant to this case and can be used to show bias. And I
15 believe we briefed that issue for Your Honor.

16 THE COURT: You did.

17 MR. BRUNELLI: Okay.

18 THE COURT: Response?

19 MR. REFSIN: Yeah, I think that we agree. I mean,
20 the Plaintiffs filed our own Motion to keep the Settlement
21 Agreements out.

22 So we agree that, at least initially, none of the
23 settlements with prior Defendants should come into evidence.
24 And we agree with Your Honor that the amounts of the
25 settlements should never come into evidence, because that's

1 clearly prejudicial. It's also very ambiguous. There are a
2 lot of reasons why a Party -

3 THE COURT: Okay.

4 MR. REFSIN: - could settle.

5 THE COURT: I got your argument.

6 MR. REFSIN: But the one thing I disagree a little
7 bit about is even the cooperation. We think the Cooperation
8 Agreements are too ambiguous. The only kind of evidence that -

9 THE COURT: You know now, I don't have a problem
10 with -- if the Cooperation Agreements, that can be for bias.

11 MR. REFSIN: Okay.

12 THE COURT: I understand the argument.

13 MR. REFSIN: All right. Yeah, my argument is that
14 you have to have a direct financial interest for the settlement
15 to be admissible, and even to show bias that there's still a
16 lot of ambiguity -

17 THE COURT: Well, if it's -

18 MR. REFSIN: - even without a Cooperation Provision.

19 THE COURT: - the witness' Company, he's got a
20 direct financial interest.

21 MR. REFSIN: No. Well, when I say direct financial
22 interest, I mean a direct financial interest in the outcome of
23 the trial.

24 Once there's a settlement, that witness doesn't have
25 an interest in the outcome, doesn't get money from the

1 settlement. If his -

2 THE COURT: Well, I understand -

3 MR. REFSIN: - amount that he pays -

4 THE COURT: - you argument.

5 MR. REFSIN: - gets reduced to -

6 THE COURT: I understand your argument, Mr. Refsin.

7 MR. REFSIN: Thank you, Your Honor.

8 THE COURT: Okay.

9 MR. BRUNELLI: Your Honor, may I have one brief
10 moment? I think, if I heard you correctly, you're of the
11 opinion that the amount of the settlement is not admissible?

12 THE COURT: Right.

13 MR. BRUNELLI: Okay. Well, we did cite, within our
14 Brief, U.S. v. Bell Harbor International, Inc., a case out of
15 the D.C. Circuit, that actually says the opposite, that the
16 terms of the Settlement Agreement, including the amount, as
17 well, including the Cooperation Agreements, as well, would be
18 both admissible.

19 THE COURT: I understand they could be both
20 admissible. But I don't have to admit them. I'm not mandated
21 to admit the amount.

22 MR. BRUNELLI: I understand that you're not
23 mandated. But we should not be precluded from offering that
24 information, if appropriate, during cross examination,
25 Your Honor, because -

1 THE COURT: Well -

2 MR. BRUNELLI: - it goes to the issue of bias. We
3 have -

4 THE COURT: - bias -

5 MR. BRUNELLI: Go ahead.

6 THE COURT: - goes to cooperation. I understand
7 that. We're in agreement there. The amount, to me, is
8 irrelevant.

9 MR. BRUNELLI: Well, Your Honor, as of now, anyway,
10 we have two Companies that settled for relatively de minimis
11 amounts, that, within their Settlement Agreement -

12 THE COURT: I don't know.

13 MR. BRUNELLI: - it contains -

14 THE COURT: I haven't seen any agreement. I don't
15 know. You're telling me that.

16 MR. BRUNELLI: I'm telling you this. Yes. There
17 are two Defendants that have settled for, what I would suggest,
18 are relatively de minimis amounts. And in their Settlement
19 Agreement, they have Cooperation Clauses.

20 THE COURT: Okay.

21 MR. BRUNELLI: On the other hand, we have a third
22 Defendant, who settled for a multi-million-dollar settlement,
23 who does not have a Cooperation Clause. Your Honor, we think
24 that those facts, presented to a jury, could show bias.

25 THE COURT: Okay, thank you.

1 MR. REFSIN: And I mean, Your Honor, that's exactly
2 the kind of argument that's severely prejudicial to any
3 Plaintiff. There's no way for a jury to assess whether a
4 settlement is de minimis.

5 I mean, he just came up here and represented that
6 they're de minimis. He didn't tell you anything about that
7 Defendant's ability to pay.

8 He didn't tell anything about why the Defendant made
9 that decision. And it's a completely ambiguous type of
10 evidence, and a severely prejudicial kind of evidence, because
11 the jury might decide that those were the real wrongdoers, or
12 that those settlements are the real value of the case.

13 It's just a very ambiguous type of evidence, the
14 amount of a settlement. You're going to have a mini-trial, if
15 you go down that road, about whether that's a de minimis
16 settlement, or a big settlement, and the reasons why it came
17 about. And that's the kind of evidence that gets excluded,
18 under Rule 403.

19 THE COURT: All right.

20 MR. GERSTEIN: Your Honor, can I just say one thing
21 about that, because I think it's clearly relevant to this, is
22 the settlement that they're talking about, which is in front of
23 you now, deals with the issue of ability to pay and the most
24 favored nation, which we've discussed beforehand.

25 That goes to the heart of it. That would mean that

1 we would have to bring in, for example, the Party with the most
2 favored nation to explain -

3 THE COURT: I understand -

4 MR. GERSTEIN: - that they waived that.

5 THE COURT: - all that. You heard -

6 MR. GERSTEIN: Okay.

7 THE COURT: - what I had to say about this. Okay.

8 (Asides)

9 THE COURT: Now, as to trial procedure, I think we
10 all agreed, but I'll go over it. At the last status conference
11 in February, I let you know some of my trial procedures.

12 But, as a reminder, it will be an eight-person jury.
13 I've decided that four alternates should be sufficient. Anyone
14 have a problem with that? No? Okay.

15 I will conduct voir dire, but will give you an
16 opportunity to ask additional questions at sidebar, with a
17 particular prospective juror. In other words, if someone
18 raises their hand in response to a question, I bring them up to
19 sidebar.

20 Counsel will be there, with that particular
21 prospective juror. And you can ask additional questions. If
22 you have an objection to that juror for cause, you should make
23 that objection for cause at that point.

24 Thereafter, you can exercise your peremptory strikes.
25 But if you don't make the challenge for cause then and there,

1 that juror's going to be back with the group. And you may have
2 to use your peremptories.

3 Each side will have five peremptory strikes. We will
4 sit from 9:30 to 4:30 each day, with an hour lunchbreak and a
5 short break in the morning, and a short break in the afternoon.

6 Each side is going to have 12 trial days. And as I
7 told you at the last status conference, you can figure out how
8 to manage that, yourselves. Do you have any issues you want to
9 raise with me now about that, at this time? No?

10 Each side will have 45 minutes to present opening
11 statements. Now, for the Defendants, I would like to have one
12 primary opening statement.

13 However, I recognize that not all the Defendants
14 share the same Counsel. To the extent that Counsel for any
15 individual Defendant would like to present opening statements,
16 I expect them to be very brief, and to address issues that are
17 specific to that Defendant, not to rehash what the primary
18 Defense opening covers. Does anyone have a problem with that,
19 or a question?

20 As a final matter, I would like to have a final
21 pretrial conference in the morning of trial. We will begin at
22 8:30 a.m. on May 20th in this courtroom.

23 Now, I understand you are all continuing to work
24 through the Defendants who are still in the case, as we move
25 into the trial. And I expect you will continue to provide the

1 Court with updates of any dismissals, or settlements, that you
2 will make appropriate filings, so that we can keep the Docket
3 in order.

4 I received Defendants' Motion to Amend the Scheduling
5 Order based on Defendant's Concerns about Disclosing Its
6 Potential Bases for Motions for Judgment, as a Matter of Law.
7 Does the Plaintiff have a position on this?

8 MR. REFSIN: Yeah, Your Honor. Well, we don't know
9 whether you want us to respond to that. I mean, our position
10 is that Your Honor has your procedures for Pretrial Orders.
11 And we will live with Your Honor's procedures.

12 We don't see it as an issue about work product. I
13 mean, people identify their legal theories all the time in
14 Pretrial Orders.

15 There's no such thing as trial by ambush. We don't
16 think it's a work product issue. But we will do what
17 Your Honor wants to do with -

18 THE COURT: Okay.

19 MR. REFSIN: - pretrial issues.

20 THE COURT: All right.

21 MR. REFSIN: And if Your Honor wants us to respond
22 formally, of course, we will do that.

23 THE COURT: You don't have to. I understand what
24 you're saying. Now, based on the Pretrial Scheduling Order, I
25 know that today is the deadline for you to exchange Reply

1 Deposition Designations and Objections to Deposition
2 Designations.

3 I'm assuming I'm going to have that. To the extent
4 that you have objections, you can submit them to me within a
5 week. And I will rule on them shortly thereafter, so you have
6 time to edit any videotaped deposition accordingly. Does
7 anyone have any designated deposition testimony that you intend
8 to introduce near the beginning of trial?

9 MR. KELLY: Your Honor, Andrew Kelly, on behalf of
10 the Class Plaintiffs. I would suspect, based on the procedures
11 the Court has outlined, that we may play deposition testimony
12 as soon as the second day of the trial.

13 THE COURT: Okay.

14 MR. KELLY: And I was unclear on whether you were
15 suggesting that Designations should come to you within a week
16 of today or -

17 THE COURT: Of today.

18 MR. KELLY: - within a week of when they're to be
19 played.

20 THE COURT: Of today.

21 MR. KELLY: Within a week of today, we should -

22 THE COURT: Yeah.

23 MR. KELLY: - submit a designated -

24 THE COURT: Right.

25 MR. KELLY: - package with -

1 THE COURT: That'll give me time -

2 MR. KELLY: - objections.

3 THE COURT: - to look at that. And if I have to
4 have a meeting with you, before trial, we have time to do it.

5 MR. KELLY: Yes, sir.

6 (Asides)

7 THE COURT: If you have an Attorney that is going to
8 read deposition into the record, I don't have a problem with
9 that. I usually allow that. But you got to let me know and
10 let the other side know.

11 MR. KELLY: Your Honor, if I could address the
12 Designation issue one more time?

13 THE COURT: Yeah.

14 MR. KELLY: One issue that's been discussed a few
15 times, during the Motions in Limine this morning, are issues
16 relating to evidence that should be precluded. Of course,
17 that's what the Motions in Limine were all about.

18 And what we have done is assumed, you know, the
19 worst, in terms of what your Rulings would be, and, thus,
20 over-designated. So, as a result of the Rulings on the Motions
21 in Limine, and other issues that have arisen, we will be
22 slashing the designated testimony dramatically.

23 I'm not sure if having it to you a week from today is
24 really plausible for us, because we don't know yet, if, for
25 example, any of the testimony about Lawyers, or

1 Capper-Volstead, or any of that has to be slashed out -

2 THE COURT: All right.

3 MR. KELLY: - or left in.

4 THE COURT: How about seven days after I issue my
5 Rulings on the Motions -

6 MR. KELLY: Fair enough -

7 THE COURT: - in Limine?

8 MR. KELLY: - Your Honor.

9 THE COURT: All right?

10 MR. KELLY: We will do our absolute best. Yes, sir.

11 THE COURT: Now, while I've, of course, familiarized
12 myself with this case, since it was transferred to me, it would
13 be helpful for me to understand the facts that remain in the
14 dispute, prior to the start of trial, especially because the
15 Parties never filed the routine Motions for Summary Judgment.
16 We never got those. So, I don't know what issues you still
17 think are part of this case.

18 As for the Summary of Applicable Law, I know that
19 your Proposed Jury Instructions will also cover this. However,
20 a short summary of the elements that must be proven for each of
21 the remaining Claims, including what must be proven for
22 Class Members to recover against each of the Defendants, would
23 be helpful.

24 For example, I understand there must be a showing at
25 trial with respect to some of the Illinois Brick Exceptions. A

1 Summary of the Applicable Law would be instructive. Are there
2 any other issues you'd like to raise at this time?

3 (Asides)

4 MR. KELLY: Yes, Your Honor. I had a couple of
5 mechanical questions. In terms of Exhibits, will there be a
6 time when the Court rules on Exhibit objections in advance of
7 trial? Or how does your process work -

8 THE COURT: Normally, what I do -- first of all, you
9 should exchange all Exhibits ahead of time.

10 MR. KELLY: Sure.

11 THE COURT: And give the Court a list of all the
12 Exhibits you intend to introduce at trial. After the trial
13 starts, you introduce your Exhibits. And by the way, if you
14 have a problem with any of the Exhibits, I want to get that
15 straightened out before trial.

16 I don't want any argument during trial about a
17 specific Exhibit. I will have ruled on that before that. So,
18 if you have a problem with intended Exhibits, I have to know
19 before trial starts.

20 MR. KELLY: Seven days, sir?

21 THE COURT: Okay.

22 MR. KELLY: Okay.

23 MR. REFSIN: Your Honor, is that for all Exhibits
24 before trial, or before a witness -

25 THE COURT: All Exhibits.

1 MR. REFSIN: - would -

2 THE COURT: All Exhibits.

3 MR. REFSIN: Okay, not before a particular witness
4 goes up; you want to do them -

5 THE COURT: No, all Exhibits; now, what I'll do is,
6 after I've ruled on all those objections to the Exhibits, the
7 trial will start. And that way, during the trial, the Exhibits
8 will come in.

9 There won't be any fights. There won't be any
10 arguments. And when Plaintiff rests, you move for the
11 admission of all your Exhibits, after you rest. We don't do it
12 piecemeal.

13 Same things with Defendants, wait until the end of
14 your case, then move for the admission of all your Exhibits at
15 one time. Now, by that time, since you've already had Rulings
16 on all the Exhibits, there shouldn't be much of a debate. Does
17 that answer your question?

18 MR. KELLY: Yes, sir.

19 THE COURT: Okay. Any other questions?

20 MR. REFSIN: What's your practice with respect to
21 whether the admitted Exhibits go back with the jury?

22 THE COURT: Say that again. Oh.

23 MR. REFSIN: Do -

24 THE COURT: I usually tell the jurors, if there is a
25 particular Exhibit they want to see, they send a note through

1 my Deputy Clerk here. And he brings it out.

2 We discuss it, the Lawyers and I, in open court, to
3 see whether there's an objection to the jurors getting that
4 particular Exhibit. If there's no objection, then I send the
5 Exhibit back. I've found that it's much easier to do it that
6 way than load the jurors down with 30 or 40, or 400 Exhibits.

7 MS. ALBANI: Your Honor?

8 THE COURT: Yes, ma'am.

9 MS. ALBANI: Yeah, we have an issue here. We were
10 advised, before the hearing this morning, that the
11 Class Plaintiffs had settled with the Named Defendants, and
12 that they had contacted Your Honor to let you know that. The
13 problem -

14 THE COURT: All right. Is this -

15 MS. ALBANI: - that we have is that -

16 THE COURT: Are you asking me -

17 MS. ALBANI: - if this goes -

18 THE COURT: Didn't you -

19 MS. ALBANI: No, this was separate.

20 THE COURT: I thought you -

21 MS. ALBANI: But we -

22 THE COURT: - raised this before we started.

23 MS. ALBANI: Well, it's a little different. They're
24 acting as though -

25 THE COURT: Oh.

1 MS. ALBANI: - there has been no settlement. Now,
2 if there is a settlement -

3 THE COURT: I don't have a settlement.

4 MS. ALBANI: - we're not privy to this.

5 THE COURT: I have not received word that they have
6 a settlement.

7 MS. ALBANI: Okay.

8 THE COURT: I know they'd talked about it. But I
9 don't know that -

10 MS. ALBANI: Well -

11 THE COURT: - anything happened.

12 MS. ALBANI: - Mr. DeStefano advised me, coming up
13 today, that a settlement had been reached, and maybe we should
14 try for a September trial date. So, I'm a little at a loss,
15 because I just found this out, as to how their Clients -

16 THE COURT: The only one who would know if there was
17 a settlement, of course, is them, and me. But I don't have
18 word that there's a settlement.

19 MS. ALBANI: Okay. This is -

20 THE COURT: I was told -

21 MS. ALBANI: - what I'm told.

22 THE COURT: - that there isn't a settlement yet.

23 MS. ALBANI: Okay. Yeah, Your Honor, we're -

24 THE COURT: I wish there were.

25 MS. ALBANI: - in the dark here.

1 THE COURT: But there isn't.

2 MS. ALBANI: We're in the dark. And if there is a
3 settlement, then we would definitely need more time, because
4 we'd have to sort out the issues of how we could get their
5 Clients to attend the trial, in addition to ours. We know we
6 will be here. But if there are Defendants that are not
7 attending the trial, we need to know that.

8 THE COURT: I understand that.

9 MS. ALBANI: We really need to know that. It's just
10 a matter of practicality and prejudice.

11 THE COURT: Well -

12 MS. ALBANI: So -

13 THE COURT: - at this moment -

14 MS. ALBANI: - we'd be -

15 THE COURT: - there is no settlement.

16 MS. ALBANI: Okay.

17 THE COURT: If there is -

18 MS. ALBANI: Okay. Mr. DeStefano -

19 THE COURT: - you better get it to me.

20 MS. ALBANI: - can speak to me as to why he advised
21 me this morning, before the hearing, that there was a
22 settlement.

23 MR. RODGERS: Your Honor, if a settlement is
24 reached, then I assume it might be appropriate, then, to reach
25 back to you to talk about adjustments in the schedule, etc.

1 THE COURT: Yeah, we can have the trial sooner.

2 MR. RODGERS: Well, it certainly would be a
3 different trial. Thank you, Your Honor.

4 MR. REFSIN: And Your Honor, going back to the
5 mechanics of Exhibits, I mean, usually Exhibits can't be shown
6 to the jury until it's admitted into evidence. What's your
7 procedure with showing the Exhibits -

8 THE COURT: Oh.

9 MR. REFSIN: - to the jury?

10 THE COURT: When you want to introduce an Exhibit
11 that we've already agreed is okay, during presenting your case,
12 you can -

13 MR. REFSIN: Okay. So, because you've ruled on any
14 objections beforehand, anything that you've ruled on already
15 can be shown to the jury, without any -

16 THE COURT: Yes.

17 MR. REFSIN: - further -

18 THE COURT: Yeah.

19 MR. REFSIN: Thank you.

20 THE COURT: You're going to stand up and say, well,
21 this Exhibit here is -- and you'll show it to them.

22 (Asides)

23 THE COURT: Anything else?

24 MR. KELLY: Your Honor, the last mechanical question
25 would be regarding the use of demonstratives in opening

1 statements: permitted or not permitted?

2 THE COURT: I permit it. What are you talking
3 about? A chart, a board, or -

4 MR. KELLY: Exactly, that -

5 THE COURT: That's fine.

6 MR. KELLY: Okay.

7 THE COURT: But you got to show it to the other
8 side, beforehand.

9 MR. KELLY: Yes, Your Honor.

10 THE COURT: Okay?

11 MR. KELLY: I'm certain we can work out a timing and
12 schedule -

13 THE COURT: Okay.

14 MR. KELLY: - for the exchange of those with the
15 Defendants.

16 THE COURT: All right. Now, if anyone, you need to
17 set the courtroom up before trial, you got to let my office
18 know, so we can make arrangements for you to come into the
19 courtroom, a day before, or two days before. And set up
20 whatever you have to set up.

21 MR. KELLY: Thank you, Your Honor. Our Tech People,
22 for the respective Parties, have been in touch. And they have
23 been in touch with Courtroom Staff, and -

24 THE COURT: Oh, good. Okay.

25 MR. KELLY: - those discussions are ongoing right

1 now.

2 THE COURT: Great; okay.

3 MR. KELLY: Your Honor, I also wanted to just state
4 for the record, because we have advised Mr. DeStefano of this
5 some weeks ago, on behalf of all Defendants at that time, was
6 that we are not pursuing Section 2 and Section 7 -- Clayton Act
7 Section 7, aspects of our Claim. We're going with the
8 straightforward Section 1, price-fixing allegations.

9 THE COURT: There you go. You've just cut down a
10 length of the trial. See that?

11 MR. DESTEFANO: That's it?

12 MR. KELLY: Yeah, it's Section 1, price fixing and
13 supply control. We're not seeking relief under Section 2, or
14 Clayton Act Section 7.

15 THE COURT: All right. Okay.

16 MR. KELLY: All right.

17 THE COURT: Anything else? All right. Have a nice
18 weekend, everybody.

19 MR. BORGER: Thank you, Your Honor.

20 MR. GERSTEIN: Thank you, Your Honor.

21 MR. MONTAGUE: Thank you, Your Honor.

22 (Proceedings concluded at 11:01 a.m.)

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C E R T I F I C A T I O N

I, VICTORIA O'CONNOR, court-approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter.

Victoria O'Connor

04/29/19

Victoria O'Connor

Date